IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 1:16CR226
	)	
Plaintiff,	)	JUDGE JOHN R. ADAMS
	)	
v.	)	
	)	
NICOLE M. GATES,	)	UNITED STATES' SENTENCING
	)	MEMORANDUM
Defendant.	)	

Now comes the United States of America, by its counsel, David A. Sierleja, Acting United States Attorney, and Megan R. Miller, Assistant United States Attorney, and respectfully submits this memorandum setting forth the United States' position regarding the sentencing for Defendant Nicole M. Gates. For the reasons set forth below and those to be articulated at the sentencing hearing, the United States respectfully submits that a Guidelines sentence at or near the high end of the applicable Guidelines range is appropriate in this case.

I. FACTUAL BACKGROUND

In support of its sentencing position, the United States offers the below summary of Gates's relevant conduct based on the United States' evidence introduced at trial. The United States also refers the Court to the description included in the Presentence Investigation Report ("PSR"). (*See* R. 63: PSR, PageID 336-39).

Over a ten-month period beginning in March 2015, Defendant Gates devised a scheme to defraud her employer and to obtain workers' compensation benefits by concealing and misrepresenting her physical ability to work. Gates—a 33-year-old woman who began receiving workers' compensation benefits in February 2010 for a left knee sprain—was a veteran of the workers' compensation system. (*See* R. 63: PSR, PageID 336). After receiving workers' compensation benefits for five previous years, in March 2015, Gates filed a second claim for a work-related injury. Gates's claim was accepted and merged with her original claim. (*Id.*)

From April 2015 through July 2015, Gates submitted documentation to the U.S. Postal Service and the Department of Labor indicating that she was physically restricted from performing her full job duties. As a result of these submissions, Gates received a part-time, limited duty assignment intended to accommodate her physical restrictions vis-à-vis walking, standing, climbing, and squatting. During this time period, however, Gates's out-of-work activities differed dramatically from her represented physical capabilities. For example, Gates was observed in April 2015 running errands, shopping, and going out to eat with no difficulty walking or standing. She was also observed in June 2015 attending a Cleveland Indians baseball and climbing down stairs from the bleacher section of the stadium while talking on her cell phone with no outward difficulty maneuvering.

On July 8 and 9, 2015, while Gates remained working only part-time, limited-duty shifts, Gates and her family went to Cedar Point Amusement Park in Sandusky, Ohio. (*See* R. 63: PSR, PageID 336). Over the course of the two-day trip, Gates walked a combined total of approximately 25 miles over 16 hours, took 50,000 steps, and ascended and descended 400 steps. During that time, Gates's medical documentation indicated that she could only walk for 4 hours a day and that she could not climb steps at all. At no point did Gates advise her employer that she was capable of walking or climbing beyond these limitations. Within two weeks of her Cedar Point trip, Gates returned to her physician complaining of incapacitating left knee pain. Gates stopped working completely on July 24, 2015, submitting documentation that she was unable able to work due to severe knee pain and instability.

Despite her alleged disability, on October 17, 2015, while Gates was completely of work, Gates and her husband participated in a ranger-led group hike of Brandywine Falls State Park. During the hike, Gates walked, climbed stairs, and maneuvered ramps on uneven surfaces for approximately 1 hour and 20 minutes. After the ranger-led hike, Gates continued to hike on her own and climbed additional steps with no outward signs of pain or discomfort. Five days later, on October 22, 2015, Gates's physician submitted a form to the U.S. Postal service showing that Gates was temporarily totally disabled and completely incapacitated from standing, walking, and climbing.

Gates's scheme culminated in a written misrepresentation to the U.S. Postal Service. On December 9, 2015, Gates completed a Current Medical Assessment Evaluation Form, in which she indicated that she was completely incapable of squatting, kneeling and bending at the knee. Gates signed this formed under penalty of perjury when, not five days prior, the United States' trial evidence revealed that Gates had shopped at Target for almost two hours. During her shopping trip, Gates was seen pushing a shopping cart and squatting all the way to the floor for approximately 45 seconds with a baby on her hip. (R. 63: PSR, PageID 337). At no point did Gates appear to be in pain or have difficulty walking, squatting, bending, carrying, or pushing. (*Id.*)

Gates perpetuated this deception regarding her physical limitations in a subsequent interview with a USPS employee, Kari Vitale, on December 9, 2015. During the interview, Ms.

Vitale specifically reviewed Gates's responses on the Current Medical Assessment Evaluation form, again reminding her of her obligation to be truthful and accurate. (*See* R. 63: PSR, PageID 337-38). Although Gates had an opportunity to change or correct any misapprehension about her responses, Gates maintained that she was completely incapable of squatting, kneeling, and bending at the knee. (*Id.*)

The evidence at trial revealed that Gates knew of her obligation to be truthful and accurate in connection with her receipt of benefits. Gates received documents as early as 2010 from both the U.S. Department of Labor and the U.S. Postal Service informing her of her duty to notify her employer if she was physically capable of performing any work. Gates was also notified that her physical capabilities were supposed to be consistent both on and off the job.

Despite Gates's reciprocal responsibilities in connection with her receipt of workers' compensation benefits, the trial evidence demonstrated that Gates ignored her responsibility to inform her employer and the Department of Labor of changes in her physical condition. Gates also Gates submitted 14 forms certifying her entitlement to workers' compensation benefits, each of which required her to certify that the information provided was true and accurate to the best of her knowledge. Gates's actions and inactions caused her to receive approximately $21,297.40 in workers' compensation benefits from April 2015 through December 2015.

II. APPLICABLE LEGAL STANDARDS

A well-established legal framework guides the Court's sentencing determination. The advisory Guidelines range serves as "the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007); *see also United States v. Collington*, 461 F.3d 805, 807 (6th Cir. 2006). The Guidelines thus remain an indispensable resource for assuring appropriate and uniform punishment for federal criminal offenses. The Sentencing "Commission fills an important institutional role: It has the capacity courts lack to 'base its determination on empirical data and national experience, guided by a professional staff with appropriate expertise.'" *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (internal citation omitted). After determining the appropriate Guidelines range, the Court then turns to the familiar factors set forth in 18 U.S.C. § 3553(a).

III. SENTENCING GUIDELINES COMPUTATION

A. APPLICABLE GUIDELINES RANGE

The United States objects to the calculation of Gates's offense level. As explained below, the United States contends that a four-level enhancement applies under U.S.S.G. § 2B2.1(b)(1)(C) for more than $15,000 in loss. With the addition of this enhancement to the applicable base offense level of 7 under U.S.S.G. § 2B1.1(a)(1), Gates's total offense level is 11. The United States agrees that the applicable Criminal History Category for Gates is I. (R. 63: PSR, PageID 341). Gates's advisory Guidelines range is thus 8 to 14 months.

B. APPLICABLE LOSS AMOUNT

U.S.S.G. § 2B1.1 governs this Court's determination of loss in fraud cases. *See* U.S.S.G. App.'x A. In determining the loss resulting from fraud in cases where the loss is "not easy to quantify, the district court need only make a reasonable estimate of the loss, given the available information." *United States v. Triana*, 468 F.3d 308, 320 (6th Cir. 2006); *see also* U.S.S.G. § 2B1.1, App. Note 3(C). "Such estimates need not be determined with precision." *Triana*, 468 F.3d at 320. A district court is required to make a finding of loss by a preponderance of the evidence. *See United States v. Blackwell*, 459 F.3d 739, 772 (6th Cir. 2006).

In determining the applicable loss amount, a defendant is responsible for the greater of the actual or intended loss occasioned by his or her relevant conduct. *See* U.S.S.G. §§ 1B1.3 and

2B1.1, App. Note 3(A). Section 1B1.3 of the Guidelines defines relevant conduct, in part, as: "all acts and omissions committed . . . counseled, commanded, induced, procured, or willfully caused by the defendant . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. §§ 1B1.3(a)(2) and (a)(1)(A). To constitute a "common scheme or plan," offenses must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. *See* U.S.S.G. § 1B1.3. App. Note 5(B)(i). Offenses may qualify as part of the same "course of conduct" if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of single episode, spree, or ongoing series of offenses. *Id.* § 1B1.3. App. Note 5(B)(ii). Relevant conduct also includes all harm that resulted from and was the object of said acts and omissions. *Id.* § 1B1.3(a)(3).

Gates should receive an additional four-level enhancement under U.S.S.G. § 2B1.1(b)(1)(B) for causing losses greater than $15,000. As set forth at trial, Gates embarked on a continuing course of conduct from April 2015 through December 2015 that caused losses of approximately $21,297.40 to the Department of Labor. Specifically, Department of Labor and U.S. Postal Service records establish that Gates received disability benefits on the daily roll from April 2015 through October 6, 2015, which permitted her to receive her 66 2/3% of her regular pay, tax free, on a bi-weekly basis. As of October 7, 2015, Gates was placed on the periodic or roll, which permitted her to receive 75% of her regular pay every four weeks, tax-free. Gates's personal checking account records corroborate her receipt of these benefits payments from the Treasury Department. The United States also introduced a summary of the checking account records setting forth the dates and gross amount of workers' compensation payments that the Gates received from April 2015 through December 2015. This evidence establishes a loss amount of $21,297.40 to the Department of Labor, and this Court may find by a preponderance of the evidence that the four-level enhancement under U.S.S.G. § 2B1.1(b)(1)(C) applies.

That Gates was acquitted of Counts 1-14 does not prohibit the Court from finding loss related to these counts for purposes of sentencing. Under Guidelines § 1B1.3, sentencing accountability is not necessarily the same as criminal liability. U.S.S.G. § 1B1.3 App. Note 1. Relevant conduct focuses on the specific acts and omissions for which the defendant should be held accountable in determining the applicable guidelines range, not whether the defendant is criminally liable. *Id.* As such, a district court may properly consider acquitted conduct at sentencing. *See United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (en banc); *see also Blackwell*, 459 F.3d at 770. The Sixth Circuit held in *White* that, "[s]o long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range." 551 F.3d at 385; *see also United States v. Martin*, 516 F. App'x 433, 449-50 (6th Cir. 2013). Therefore, this Court may consider Gates's entire course of conduct from April 2015 through December 2015 in finding a loss amount for sentencing purposes.

As evidenced at trial, from April 2015 through December 2015, Gates caused $21,297.40 in losses to the Department of Labor as a direct result of her omissions and misrepresentations in connection with her receipt of federal workers' compensation benefits. Accordingly, Gates should receive an additional four-level sentence enhancement under U.S.S.G. § 2B1.1(b)(1)(C).

IV. APPLICATION OF § 3553(A) FACTORS

A. NATURE AND CIRCUMSTANCES OF THE OFFENSE

The nature and circumstances of the offense counsel in favor of a sentence at or near the high end of the applicable Guidelines range. As adduced at trial, Gates developed a thorough understanding of the Department of Labor's complex workers' compensation program and used her knowledge to exploit the system. As a multi-year veteran of the program, Gates learned what she needed to say to her physicians, the U.S. Postal Service, and the Department of Labor to remain off work yet continue to receive benefits. In the almost six years during which Gates received workers' compensation, she worked *one* full-time, full-duty shift. (*See* Summary of Hours Worked Chart, attached hereto as Ex. A). Most of the time, Gates averaged a total of 3.58 hours of part-time, limited duty shifts. (*See id.*) Gates soon learned that her light work schedule coupled with the salary recoupment offered through workers' compensation permitted her to devote the majority of her time not to her job, but to going about her life as she pleased. Indeed, Gates was far from homebound during April 2015 through December 2015, even when allegedly completely physically incapacitated. As evidenced by the surveillance video and bank statements introduced at trial, Gates frequently enjoyed multiple activities unavailable to most hard-working adults during the day— providing free-child care, running errands, shopping, and going out to lunch.

Moreover, during this time, Gates ignored her obligation to inform her employer of her true ability to work or of changes in her physical limitations. Instead, Gates filled out 14 forms certifying her entitlement to workers' compensation benefits. Each time, she signed under a penalty of perjury clause informing her that providing false or misleading information was a crime. As a result, Gates continued to accept the benefit of her workers' compensation payments without correcting her employer's misapprehension regarding her medical condition.

Over the course of her fraud, Gates's actions progressed from concealing her true physical abilities to affirmatively misrepresenting them to her employer. Gates's scheme culminated in December 2015, when she unequivocally filled out a form in which she attested, again under penalty of perjury, that her physical condition completely prohibited her from kneeling, squatting, and bending at the knee. Notably, when given the opportunity to change or clarify this statement, Gates again affirmed it verbally to USPS employees. This escalating course of conduct demonstrates that Gates was only becoming more brazen and confident in her ability to misuse the system.

B. NEED FOR THE SENTENCE IMPOSED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW, TO PROVIDE JUST PUNISHMENT, AND TO AFFORD ADEQUATE DETERRENCE

A sentence at or near the high end of the Guidelines range also will adequately reflect the severity of the offense, promote respect for the law, and provide adequate deterrence for Gates and others contemplating similar crimes. Workers' compensation fraud is a serious offense with far-reaching consequences. The federal workers' compensation program is designed to provide financial security for hard-working federal employees who are injured in the course of their duties. Used appropriately, the program provides salary continuity and pays medical bills for injured workers, serving as a safeguard for injured workers and their families during times of need. Defrauding the workers' compensation program not only undercuts this laudable goal but also diverts resources from deserving employees.

In addition to the financial loss occasioned by Gates's receipt of workers' compensation benefits to which she was not entitled, Gates's conduct wasted the valuable time and resources of the people responsible for processing her claim. The United States presented evidence at trial that the workers' compensation program relies on an injured worker's honesty and integrity to function properly. Department of Labor claims examiners, who process hundreds of cases at a time, necessarily rely on "the honor system" to fulfill the program's mission of protecting the injured worker. Likewise, the U.S. Postal Service human resources manager who oversaw Gates's claim, relied on the accuracy of Gates's information to determine whether and how to best facilitate her return to work. To date, Gates has not accepted any responsibility for her conduct. A sentence of imprisonment thus is appropriate to reflect the seriousness of the offense.

V. CONCLUSION

For these reasons and those to be articulated at the sentencing hearing, the United States respectfully requests that the Court impose a term of imprisonment at or near the high end of the applicable Guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2017 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Megan R. Miller
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